

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





# TRANSCRIPT OF RECORD

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## Court of Appeals of the District of Columbia

JANUARY TERM, 1934.

No. 6185

Special Calendar.

520

THE UNITED STATES OF AMERICA EX RELATIONE WHITEFOORD R. COLE, APPELLANT,

*vs.*

GUY T. HELVERING, COMMISSIONER OF  
INTERNAL REVENUE.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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FILED MARCH 12, 1934.

PRINTED MARCH 19, 1934.

# Court of Appeals of the District of Columbia

JANUARY TERM, 1934.

## No. 6185

THE UNITED STATES OF AMERICA EX RELATIONE WHITEFOORD R. COLE, APPELLANT,

*vs.*

GUY T. HELVERING, COMMISSIONER OF  
INTERNAL REVENUE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1934.



# Court of Appeals of the District of Columbia

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No. 6185.

THE UNITED STATES OF AMERICA, ex Relatione WHITEFOORD R.  
COLE, Appellant,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue.

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*a* Supreme Court of the District of Columbia.

At Law.

No. 83277.

THE UNITED STATES OF AMERICA, ex Relatione WHITEFOORD R.  
COLE, Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,  
Respondent.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

*Petition for Writ of Mandamus.*

Filed October 3, 1933.

In the Supreme Court of the District of Columbia.

At Law.

No. 83277.

THE UNITED STATES OF AMERICA, ex Relatione WHITEFOORD R.  
COLE, Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,  
Respondent.

The petition of the United States of America on the relation of Whitefoord R. Cole, respectfully represents unto this honorable court:

1. That the said Whitefoord R. Cole is a citizen of the United States and a resident of Louisville, Kentucky.

2. That the respondent, Guy T. Helvering, is the duly appointed, qualified and acting Commissioner of Internal Revenue, and as such is sued in respect of his official duties as herein more specifically set forth.

3. That the said Whitefoord R. Cole, on or before March 15, 1930 duly filed with the Collector of Internal Revenue for the District of Kentucky, his income tax return for the calendar year 1929 on which he paid a tax of Twenty-five Thousand, Seventeen Dollars and Forty-Three Cents (\$25,017.43), within the time provided by law.

4. That on March 3, 1932, the respondent, the Commissioner of Internal Revenue, erroneously determined a deficiency in income taxes for the calendar year 1929 against the said Whitefoord R. Cole in the sum of Ten Thousand One Hundred and Twenty-Six Dollars and Thirty-Seven Cents (\$10,126.37), and illegally assessed and cer-

2      tified the same to the said Collector of Internal Revenue for collection, and after demand, the said Whitefoord R. Cole, on May 14, 1932 paid to the said collector under protest Ten Thousand One Hundred and Twenty-Six Dollars and Thirty-Seven Cents (\$10,126.37)



plus One Thousand Two Hundred and Ninety Dollars and Seventy-Six Cents (\$1,290.76) interest thereon.

5. That, thereafter, on June 15, 1932, your relator brought suit against the said Collector of Internal Revenue in the United States District Court for the Western District of Kentucky for the refund of Nine Thousand Six Hundred and Ninety-Three Dollars and Twenty-Three Cents (\$9,693.23) overpayment of income taxes for the calendar year 1929, together with six per cent interest thereon from May 14, 1932 until paid, for his costs and all proper relief, on the ground that the said assessment and payment were illegal and erroneous. The said suit was entitled "Whitefoord R. Cole, Plaintiff, vs. E. S. Helburn, Collector of Internal Revenue for the District of Kentucky, Defendant" and its docket number was #1474.

6. That, thereafter, on April 7, 1933 the said United States District Court for the Western District of Kentucky entered final judgment in favor of the Plaintiff, your relator, against the said collector, in the amount of Eight Thousand Two Hundred and Sixty-Nine Dollars and Three Cents (\$8,269.03), plus interest at the rate of six per cent thereon per annum from May 14, 1932 until paid, plus costs; and at the same time, a certificate of probable cause was entered by the said court in the case. Certified copy of said judgment is attached hereto, and filed herewith as part hereof, identified "Exhibit I".

7. That thereafter, on June 10, 1933, the defendant  
3 therein, the said collector, filed an appeal with the United States Circuit Court of Appeals for the Sixth Circuit, and on August 18, 1933 on motion of the said collector, the appellant, the said appeal was dismissed.

8. That, on April 8, 1933, your relator mailed to the respondent, the Commissioner of Internal Revenue, his claim for refund of Eight Thousand Two Hundred and Sixty-Nine Dollars and Three Cents (\$8,269.03) plus interest, plus Seventeen Dollars and Sixty Cents (\$17.60), costs, in the manner and form provided by law. Copy of said claim for refund, without exhibits, is attached hereto and filed herewith as part hereof, identified "Exhibit II".

9. That, on July 17, 1933 the respondent issued a Certificate of Overassessment Judgment Claim, numbered 2262709, Schedule No. 50584, and Treasury check for \$1,548.66, which sum comprised \$1,430.24 of the principal



judgment, \$100.82 interest thereon and \$17.60 costs; but the respondent illegally withheld, as stated in the said certificate:

“Less amount withheld in connection with proposed deficiency for 1928 ..... \$6,838.79”

Copy of said certificate is attached hereto, and filed herewith as part hereof, identified “Exhibit III”.

10. That the respondent erroneously contends that he is prohibited from issuing a certificate of overassessment and check for the said Six Thousand Eight Hundred and Thirty-Eight Dollars and Seventy-Nine Cents (\$6,838.79) by section 322(a) of the Revenue Act of 1928.

11. That under Section 3220 of the U. S. Revised Statutes, the respondent, the Commissioner of Internal Revenue, is the duly delegated and proper officer of the United States government, authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, and that the said respondent does now and at all times has refused to remit, refund or pay back the balance of Six Thousand Eight Hundred and Thirty-Eight Dollars and Seventy-Nine Cents (\$6,838.79) taxes erroneously and illegally assessed and collected from your relator, plus six per cent interest thereon, from May 14, 1932, as provided in the aforesaid judgment, Exhibit I.

12. That, by letter dated January 29, 1931, the respondent proposed to assess a deficiency in income taxes of Five Thousand Eight Hundred and Seven Dollars and Fifty-Four Cents (\$5,807.54) against your relator for the calendar year 1928, and thereafter within sixty days therefrom your relator filed an appeal from the said proposed determination, to the United States Board of Tax Appeals, which appeal is still pending and undecided before the said Board.

13. That your relator is solvent to many times the amount of the abovesaid proposed deficiency of Five Thousand Eight Hundred and Seven Dollars and Fifty-Four Cents (\$5,807.54); that no jeopardy assessment has been made thereon and that until the decision of the said United States Board of Tax Appeals becomes final, no assessment nor collection thereof can be made under the provisions of Section 272 of the Revenue Act of 1928; and that therefore, the said proposed deficiency of Five Thousand Eight Hun-



dred and Seven Dollars and Fifty-Four Cents (\$5,807.54) is not "income, war-profits, or excess profits tax or installment thereof *then due*" in the language of Section 322(a) of the Revenue Act of 1928.

14. That no income, war-profits or excess-profits tax or installment thereof is due from the relator to the United States government.

5       Wherefore, the premises considered, your relator prays:

I. That a writ of mandamus may be issued, directed to the respondent, Guy T. Helvering, Commissioner of Internal Revenue commanding him to issue a certificate of overassessment and Treasury check for Six Thousand Eight Hundred and Thirty-Eight Dollars and Seventy-Nine Cents (\$6,838.79) plus six per cent (6%) interest per annum from May 14, 1932 until the date of payment.

II. That a rule may be issued requiring the respondent, Guy T. Helvering, Commissioner of Internal Revenue, to show cause, if any he has, why a writ of mandamus may not be issued as herein prayed.

III. For such other right or rights, relief, or order as to the court may seem proper and the nature of the case may require.

ANDREW T. SMITH,  
ELWOOD HAMILTON,  
J. C. W. BECKHAM, JR.,  
*Attorneys for Petitioner.*

The affiant, Whitefoord R. Cole, your relator herein, states under oath that he has read the foregoing petition, and the facts stated therein are true.

WHITEFOORD R. COLE.

Subscribed and sworn to before me this the 28th day of September, 1933.

[NOTARIAL SEAL.]

C. W. SHAFT,  
*Notary Public, Jefferson Co., Ky.*

My commission expires May 24, 1934.



## "EXHIBIT I."

In the United States District Court for the Western District of Kentucky.

No. 1474.

WHITEFOORD R. COLE, Plaintiff,

vs.

E. S. HELBURN, Collector of Internal Revenue for the District of Kentucky, Defendant.

Judgment. 83277.

It is hereby ordered, adjudged and decreed, that the plaintiff have judgment against the defendant for \$8,269.03 together with lawful interest thereon from May 14, 1932, until paid.

It appearing to the Court that the above sum was collected by the defendant from the plaintiff after an assessment had been made therefor by the Commissioner of Internal Revenue and certified by him to the defendant for collection, it is adjudged that there was probable cause for the collection thereof by the defendant from the plaintiff. It is therefore adjudged that no execution issue against the defendant for any part of this judgment; that said is a claim against the United States of America and shall be paid in the form and manner as provided by law.

It is further adjudged that the plaintiff recover, as a part of this judgment, his costs in this action expended.

The plaintiff's motion for the Court to find as a fact and conclusion of law that the plaintiff realized a gain of only \$6,423.00 instead of \$11,598.00 on the sale of 300 shares of Atlantic Coast Line Stock during the calendar year 1929 is overruled, to which ruling of the Court the plaintiff objects and excepts.

The defendant's motion for the Court to find as a fact and conclusion of law that the plaintiff had not sustained a deductible loss from taxable income of \$30,684.50 during the calendar year 1929 on the sale of 1000 shares of Earl Radio Corporation and 800 shares of Arcturus Radio Corporation stock is overruled, to which ruling of the Court the defendant objects and excepts.

CHAS. I. DAWSON,

*Judge.*



UNITED STATES OF AMERICA,

*Western District of Kentucky, ss:*

I, Lilburn Phelps, Clerk of the United States District Court in and for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original judgment entered by Judge Chas. I. Dawson, on April 7, 1933 in cause No. 1474 at Law—styled Whitefoord R. Cole vs. E. S. Helburn, Collector of Internal Revenue for the District of Kentucky, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at  
8      Louisville this 28th day of September, A. D. 1933.

[SEAL.]

LILBURN PHELPS,

*Clerk,*

By ———,

*Deputy Clerk.*

“EXHIBIT II.”

Form 843.

Treasury Department, Internal Revenue Service.

Revised June, 1930.

Claim to be filed with the Collector where Assessment was made or tax paid.

Collector's Stamp. Date received: ———, ———, ———.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

(    ) Refund of Tax Illegally Collected.

(    ) Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

(    ) Abatement of Tax Assessed (not applicable to estate or income taxes).

STATE OF KENTUCKY,

*County of Jefferson, ss:*

(Type or print.)

Name of taxpayer or purchaser of stamps: Whitefoord R. Cole.



Business address (Street): President, L. & N. Railroad;  
(City:) Louisville; (State:) Kentucky.

Residence: 2515 Longest Avenue, Louisville, Ky.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Kentucky.

2. Period (if for income tax, make separate form for each taxable year) from: Jan. 1, 1929, to Dec. 31, 1929.

9 3. Character of assessment or tax: Income.

4. Amount of assessment: \$10,126.37 & \$1,290.76 interest; dates of payment: May 14, 1932.

5. Date stamps were purchased from the Government:  
— —, — —.

6. Amount to be refunded: \$17.60 costs and \$8,269.03 plus interest.

7. Amount to be abated (not applicable to income or estate taxes): —.

8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1928, on May 14, 1932.

The deponent verily believes that this claim should be allowed for the following reasons: The affiant, Whitefoord R. Cole, under oath states that on the 15th day of June 1932 he brought suit in his own name against the Hon. E. S. Helburn, Collector of Internal Revenue for the District of Kentucky in the United States District Court for the Western District of Kentucky for the recovery of income taxes unlawfully collected for the calendar year 1929. The affiant states that on the 7th day of April 1933, the said Court adjudged that the affiant recover \$8,269.03 together with lawful interest thereon from May 14, 1932 until paid, his costs therein expended, and that there was probable cause for the collection thereof by the said E. S. Helburn.

Appended hereto as exhibits are (Exhibit A) certified copy of the final judgment in duplicate with certificate of probable cause (Exhibit B), and an itemized bill of costs paid receipted by the Clerk.



10

## "EXHIBIT III."

Treasury Department, Washington.

IT:C:CC-4-EKT.

Certificate of Overassessment. Judgment. Claim.

Number: 2262709.

Allowed: \$1548.66.

Schedule No. 50584.

Mr. Whitefoord R. Cole,  
2515 Longest Avenue,  
Louisville, Kentucky.

SIR:

This Certificate of Overassessment is issued in partial settlement of a judgment for the recovery of income taxes paid for the year 1929, the judgment having been rendered against E. S. Helburn, Collector of Internal Revenue for the District of Kentucky, by the District Court of the United States, Western District of Kentucky.

## Summary of Judgment and costs:

|                                                                                                     |            |
|-----------------------------------------------------------------------------------------------------|------------|
| Judgment for 1929 (tax and interest paid) .....                                                     | \$8,269.03 |
| Less amount withheld in connection with proposed deficiency for 1928 ..                             | 6,838.79   |
|                                                                                                     | <hr/>      |
| Net amount payable .....                                                                            | \$1,430.24 |
| Interest at 6% (Sec. 615, Rev. Act 1928) from May 14, 1932 (date of payment) to July 17, 1933 ..... | 100.82     |
| Costs .....                                                                                         | 17.60      |
|                                                                                                     | <hr/>      |
| Total amount payable .....                                                                          | \$1,548.66 |

The amount payable is covered by the inclosed Treasury check.

The interest, if any, included herein is taxable income, and must be included in your income tax return for the year in which received.

By direction of the Deputy Commissioner:

Respectfully,  
(Sgd.)

T. F. LANGLEY,  
*Head of Division.*

Amount payable: \$1,548.66.

*Memorandum.*

October 3, 1933.—Rule to show cause issued.

11

*Answer of Respondent.*

Filed October 12, 1933.

\* \* \* \* \*

Now comes Guy T. Helvering, Commissioner of Internal Revenue, and reserving unto himself the benefits of all objections and exceptions to the errors and insufficiencies of the petition filed herein and to the jurisdiction of the court in the premises and relying on the same as if motion to dismiss had been interposed, nevertheless files this, his answer to so much and such parts of the said petition and the rule to show cause issued herein as he is advised it is material or necessary for him to make answer unto, and says:

1. Respondent admits the averments of the 1st paragraph of the petition.

2. Respondent admits the averments of the 2nd paragraph of the petition.

3. Respondent admits the averments of the 3rd paragraph of the petition.

4. Respondent admits the averments of the 4th paragraph of the petition save and except that the determination of the deficiency as aforesaid was erroneous and that the deficiency was illegally assessed and certified to the Collector of Internal Revenue for collection, which averments are expressly denied.

5. Respondent admits the averments of the 5th paragraph of the petition.

6. Respondent admits the averments of the 6th paragraph of the petition.

7. Respondent admits the averments of the 7th paragraph of the petition save and except that the date of the dismissal of the appeal was August 18, 1933, which  
12 is denied. The respondent avers that the date of dismissal of the appeal as aforesaid was October 4, 1933.

8. Respondent admits the averments of the 8th paragraph of the petition.



9. Respondent admits the averments of the 9th paragraph of the petition save and except such portion of the 9th paragraph of the petition which avers that the respondent illegally withheld \$6,838.79, which is expressly denied. Further answering the 9th paragraph of the petition the respondent affirmatively alleges that under and pursuant to Sec. 322 of the Revenue Act of 1932 he is authorized and required by law to withhold payment of the sum of \$6,838.79 as set forth in the certificate of overassessment as aforesaid until such time as has finally been determined by the Board of Tax Appeals an appeal which has been filed by the relator from an asserted deficiency in the sum of \$5,807.54 for the year 1928; that the appeal to the Board of Tax Appeals as aforesaid is there pending at this time undecided. The respondent further asserts that the Act of March 3, 1875 (18 Stat. 481) requires the withholding of any refund to the relator as long as there is a claim against the relator by the United States for any taxes outstanding.

10. Respondent admits the averments of the 10th paragraph of the petition save and except the averment that the action there set forth was erroneous, which is expressly denied.

11. Respondent admits the averments of the 11th paragraph of the petition save and except the conclusions of law therein expressed as to his duties as Commissioner of Internal Revenue which he avers that he is not required to make answer unto.

12. Respondent admits the averments of the 12th paragraph of the petition.

13. Respondent has no knowledge or information sufficient to form a belief as to the solvency of the relator and, therefore, neither admits nor denies the averments in regard thereto. Respondent admits that no jeopardy assessment has been made of the sum of \$5,807.54 asserted as a deficiency against the relator with reference to which an appeal is now pending before the Board of Tax Appeals undetermined, and further admits that no assessment or collection can be made of such deficiency in taxes until the decision of the Board of Tax Appeals shall have become final. Respondent neither admits nor denies the averment that said proposed deficiency of Five Thousand Eight Hundred and Seven Dollars and Fifty-four



Cents (\$5,807.54) is not "income, war-profits, or excess profits tax or installment thereof then due" in the language of Section 322 (a) of the Revenue Act of 1928, as such averment is a conclusion of law to be passed upon by the court.

14. Respondent denies the averments of the 14th paragraph of the petition.

Wherefore, having fully answered the petition filed herein and the rule to show cause, respondent prays that the petition be dismissed and the rule to show cause discharged, with costs.

GUY T. HELVERING,

*Commissioner of Internal Revenue.*

LEO A. ROVER,

*United States Attorney,*

JOHN W. FIELLY,

*Assistant United States Attorney,*

CHAS. K. HOOVER,

*Attorney, General Counsel's Office,*

*Attorneys for Respondent Helvering.*

14 DISTRICT OF COLUMBIA, ss:

Guy T. Helvering, Commissioner of Internal Revenue, being first duly sworn deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof; that the facts therein stated upon personal knowledge are true; and that those set forth upon his information and belief are believed to be true.

GUY T. HELVERING,

*Commissioner of Internal Revenue.*

Subscribed and sworn to before me this 11th day of October, A. D. 1933.

[NOTARIAL SEAL.]

C. E. BITTINGER,

*Notary Public.*



*Agreed Statement of Facts.*

Filed December 4, 1933.

\* \* \* \* \*

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken as true.

1. That the petitioner, Whitefoord R. Cole, is solvent.

ELWOOD HAMILTON,

ANDREW T. SMITH,

*Attorneys for Relator.*

LEO A. ROVER,

*U. S. Attorney,*

JOHN W. FIHELLY,

*Assist. U. S. Attorney,*

*Attorneys for Respondent.*

15

*Demurrer.*

Filed December 4, 1933.

\* \* \* \* \*

Comes the petitioner by his attorneys and demurs to the answer of the respondent in this case and for cause of demurrer shows:

First: That said answer of respondent as a whole sets out no defense to the petition.

Second: That the allegations of paragraph 9 of respondent's answer state no defense to this action.

Third: That the allegations of paragraph 13 of respondent's answer state no defense to this action.

Petitioner relies on Subsection (a), Section 322 of the Revenue Act of 1932, U. S. C. A., Title 26, Section 3322 (1932 Supplement) to support this demurrer.

Wherefore, this defendant demurs and prays judgment of the Court on each and all of the grounds of demurrer herein taken.

ANDREW T. SMITH,

ELWOOD HAMILTON,

*Attorneys for Petitioner.*

16 Supreme Court of the District of Columbia.

Friday, December 29, 1933.

Session resumed pursuant to adjournment, Hon. F. D. Letts, Justice, presiding.

\* \* \* \* \*



Upon consideration of the demurrer filed herein, to the answer, it is ordered that said demurrer be, and the same is hereby overruled.

Wednesday, January 3, 1934.

Session resumed pursuant to adjournment, Hon. Jesse C. Adkins, Justice, presiding.

\* \* \* \* \*

Comes now the petitioner by his attorney of record and now, in open Court, elects to stand on his demurrer filed herein to the answer, and it appearing to the Court that said demurrer was overruled upon the 29th day of December, 1933, judgment is accordingly ordered in conformity therewith and the petition filed herein is hereby dismissed and the rule issued on said petition discharged.

Wherefore, it is considered that petitioner take nothing by this action that respondent go hence without day, be for nothing held and recover of petitioner his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the petitioner by his attorney of record, in open Court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty  
17 Dollars (\$50.00) cash with the clerk in lieu thereof.

*Memorandum.*

January 22, 1934.—\$50 deposited as costs on appeal in lieu of bond.

*Petitioner's Assignment of Error.*

Filed January 24, 1934.

\* \* \* \* \*

Comes now the petitioner, Whitefoord R. Cole by his attorneys, Elwood Hamilton, Andrew T. Smith and Lewis H. Barnes, and assigns as error in the above entitled cause the following:

1. The Court erred in ruling and holding that petitioner's petition was bad in substance.

2. The Court erred in overruling petitioner's demurrer to respondent's answer.

3. The Court erred in holding and ruling that respondent had any discretion or right to deny the petitioner his refund of income taxes overpaid for the year 1929.



4. The Court erred in denying the prayers of the petition and refusing the issuance of the writ of mandamus.

5. The Court erred in not holding respondent's answer set out no defense to petitioner's petition.

6. The Court erred in not ordering the clerk of the Court to issue a peremptory writ of mandamus directing the respondent to repay to the petitioner the income taxes for the year 1929, illegally and unlawfully collected and withheld by respondent.

7. The Court erred in not ruling and holding that the respondent had no discretion and no right to refuse to repay to petitioner the income taxes for the year 18 1929, illegally and unlawfully collected and withheld by respondent.

8. The Court erred in not holding and ruling that petitioner was entitled to have repaid to him by respondent the income taxes for the year 1929, illegally and unlawfully collected and withheld by respondent.

9. The Court erred in holding and ruling that respondent had any discretion or right to refuse to repay to petitioner income taxes for the year 1929, illegally and unlawfully collected and withheld by respondent.

10. The Court erred in passing and entering the order of January 3, 1934.

ELWOOD HAMILTON,  
ANDREW T. SMITH,  
LEWIS H. BARNES,  
*Attorneys for Petitioner.*

Service of a copy of the above Assignment of Error acknowledged this 24th day of January, 1934.

JOHN W. FIHELLY,  
*Assist. U. S. Attorney,  
Attorney for Respondent.*

*Designation of Record.*

Filed January 24, 1934.

\* \* \* \* \*

In preparing the record on appeal in the above-entitled case, the Clerk will please include:

1. The petition and rule to show cause filed October 3, 1933.

2. The answer to the petition and rule.



- 19        3. The agreed statement of facts filed December 4, 1933.
4. The demurrer to the answer.
  5. The minute entry overruling the demurrer.
  6. The notation of the appeal.
  7. The assignment of error.
  8. This designation.

ELWOOD HAMILTON,  
ANDREW T. SMITH,  
LEWIS H. BARNES,  
*Attorneys for Petitioner.*

Service of a copy of Designation of Record on Appeal this 24th day of January, 1934.

JOHN W. FIHELLY,  
*Assist. U. S. Attorney,*  
*Attorney for Respondent.*

20        Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 19, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 83277 at Law, wherein The United States of America ex relatione Whitefoord R. Cole is Petitioner and Guy T. Helvering, Commissioner of Internal Revenue is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of March, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,  
*Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 6185. The United States of America, ex relatione Whitefoord R. Cole, appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Mar. 12, 1934. Henry W. Hodges, Clerk.









MAY 7 - 1934

*Henry W. Hodges*  
CLERK

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# Court of Appeals of the District of Columbia

January Term, 1934.

No. 6185.

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THE UNITED STATES OF AMERICA, Ex  
Relatione WHITEFOORD R. COLE, - Appellant,

*versus*

GUY T. HELVERING, Commissioner of In-  
ternal Revenue, - - - - - Appellee.

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## BRIEF FOR APPELLANT.

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ANDREW T. SMITH,  
LEWIS H. BARNES,  
ELWOOD HAMILTON,

*Counsel for Appellant.*





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# Court of Appeals of the District of Columbia

January Term, 1934.

No. 6185.

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THE UNITED STATES OF AMERICA, EX RE-  
LATIONE WHITEFOORD R. COLE, - *Appellant,*

*v.*

GUY T. HELVERING, COMMISSIONER OF IN-  
TERNAL REVENUE, - - - - *Appellee.*

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## BRIEF FOR APPELLANT.

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### I.

#### STATEMENT OF CASE.

This is an appeal from the decision of the Supreme Court of the District of Columbia overruling appellant's demurrer to appellee's answer in the lower Court, the appellant having elected to stand on his demurrer, his petition having been dismissed (R. 13-14).

**II.****STATEMENT OF FACTS.**

The appellant instituted this action in the lower Court against the appellee seeking a writ of mandamus against him as Commissioner of Internal Revenue to compel him to issue a certificate of over-assessment and treasury check for \$6,838.79 plus six per cent thereon from May 14, 1932, in satisfaction of a judgment he had obtained against the Collector of Internal Revenue for the District of Kentucky. The facts alleged in the petition and confessed by the answer of the appellee were that on or before March 15, 1930, the appellant duly filed his income tax return for the calendar year 1929 with the Collector of Internal Revenue for the District of Kentucky showing taxes due of \$25,017.43, all of which were duly paid. Thereafter, on March 3, 1932, the Commissioner of Internal Revenue, after an audit and review, determined and assessed against the appellant \$10,126.37 additional taxes for the calendar year 1929. On May 14, 1932, the appellant paid this sum together with \$1,290.76 interest to the Collector of Internal Revenue for the District of Kentucky. On June 15, 1932, the appellant sued the Collector in the United States District Court for the Western District, at Louisville, Kentucky, to recover of him \$9,693.23, together with interest. On April 7, 1933, judgment with certificate of probable



cause was entered in said Court in favor of the appellant and a recovery decreed against the Collector of \$8,269.03 with interest from May 14, 1932. An appeal was prosecuted by the Collector to the Sixth Circuit Court of Appeals and dismissed on October 4, 1933, on motion of the Collector.

On April 8, 1933, the appellant filed with the Commissioner of Internal Revenue a judgment refund claim for the amount that had been decreed to him in the District Court. On July 17, 1933, the Commissioner of Internal Revenue acted on said claim and "issued certificate of overassessment, judgment claim No. 2262709, Schedule No. 50584" and issued to the appellant and mailed to the Collector of Internal Revenue for the District of Kentucky, Treasury check for \$1,548.66. The certificate of overassessment bore the notation "less amount withheld in connection with proposed deficiency for 1928, \$6,838.79."

On January 29, 1931, the then Commissioner of Internal Revenue, after an audit and review of appellant's income tax return for the calendar year 1928, and before an audit of his return for 1929, found a deficiency in income taxes for the calendar year 1928 in the sum of \$5,807.54 and by letter of January 29, 1931 notified the appellant of the proposed assessment of the deficiency and in said letter advised him of his right under Section 272 of the Revenue Act of 1928 to appeal from the Commissioner's action to the Board of Tax Appeals within



sixty days, which the appellant did. This appeal was pending at the time the appellant instituted his action for recovery of 1929 taxes in the United States Court for the Western District of Kentucky and said matter is still pending before the Board of Tax Appeals undecided. No other demand has been made on the appellant for the payment of any deficiency of taxes for the calendar year 1928. The appellee refused to refund \$6,838.79 of the judgment the appellant had recovered for the calendar year 1929 on the ground that he owed a deficiency of \$6,838.79 for the calendar year 1928, which was contested before the Board of Tax Appeals before any controversy arose concerning 1929.

The appellant is solvent and the collection of the additional tax for 1928, if any due, is not jeopardized and the Commissioner of Internal Revenue has not assessed or made demand for the payment of any deficiency for 1928 and the Collector of Internal Revenue has not demanded payment.

### III.

#### STATUTORY LAW INVOLVED.

Income Tax Act of 1928 (45 Stat. 876),  
U. S. C. A. Title 26, Sec. 2001:

“Sec. 1. The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. \* \* \*”



Sec. 51 Revenue Act of 1928  
(U. S. C. A., Title 26, 2051):

INDIVIDUAL RETURNS:

“(a) Requirement.—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of \$1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income.”

Sec. 56, Revenue Act of 1928  
(U. S. C. A., Title 26, Sec. 2056):

PAYMENT OF TAX:

(a) Time of payment.—The total amount of tax imposed by this title shall be paid on the fifteenth of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) Installment payments.—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the



date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

(c) Extension of time for payment.—At the request of the taxpayer, the Commissioner may extend the time for payment of the amount determined as the tax by the taxpayer, or any installment thereof, for a period not to exceed six months from the date prescribed for the payment of the tax or an installment thereof. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.”

U. S. C. A., Title 26, Section 2271:

“DEFINITION OF DEFICIENCY:

“As used in this title in respect of a tax imposed by this title ‘deficiency’ means—

(a) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.”



## U. S. C. A., Title 26, Section 2272:

## PROCEDURE IN GENERAL:

“(a) Petition to Board of Tax Appeals.— If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer nor until the expiration of such 60-day period, nor if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 154 of this title the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

For exceptions to the restrictions imposed by this subsection, see—

(1) Subsection (d) of this section, relating to waivers by the taxpayer;

(2) Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the returns;

(3) Section 3273, relating to jeopardy assessments;

(4) Section 3274, relating to bankruptcy and receiverships; and

(5) Section 1224 of this title, relating to assessment or collection of the amount of the



deficiency determined by the Board pending court review.

(b) *Collection of Deficiency Found by the Board.* If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) *Failure to File Petition.* If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) *Waiver of Restrictions.* The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

(e) *Increase of Deficiency After Notice Mailed.* The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) *Further Deficiency Letters Restricted.* If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection



(a) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (e) of this section, relating to assertion of greater deficiencies before the Board, or in section 3273(c), relating to the making of jeopardy assessments. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered (for the purposes of this subsection, or of subsection (a) of this section, prohibiting assessment and collection until notice of deficiency has been mailed, or of section 3322(c) prohibiting credits or refunds after petition to the Board of Tax Appeals) as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section.

(g) *Jurisdiction Over Other Taxable Years.*

The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

(h) *Final Decisions of Board.* For the purposes of this title the date on which a decision of the Board becomes final shall be deter-



mined according to the provisions of section 1228 of this title.

(i) *Prorating of Deficiency to Installments.* If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in section 3273 (relating to jeopardy assessments), that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(j) *Extension of Time for Payment of Deficiencies.* Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of twelve months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension.

(k) *Address for Notice of Deficiency.* In the absence of notice to the Commissioner under section 3312(a) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this title, if mailed to the taxpayer at his last known address, shall be suffi-



cient for the purposes of this title even if such taxpayer is deceased or is under a legal disability, or, in the case of a corporation, has terminated its existence.”

U. S. C. A., Title 26, Section 2273:

JEOPARDY ASSESSMENTS—

“(a) *Authority for Making.* If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.* If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 3272(a) then the Commissioner shall mail a notice under such subsection within 60 days after the making of the assessment.

(c) *Amount Assessable Before Decision of Board.* The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 3272(f) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Board of Tax Appeals. The Commissioner shall notify the Board of the amount of such assessment, if the petition is filed with the Board before the making of the assessment or if subsequently filed, and the Board shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.



(d) *Amount Assessable After Decision of Board.* If the jeopardy assessment is made after the decision of the Board is rendered such assessment may be made only in respect of the deficiency determined by the Board in its decision.

(e) *Expiration of Right to Assess.* A jeopardy assessment may not be made after the decision of the Board has become final or after the taxpayer has filed a petition for review of the decision of the Board.

(f) *Bond to Stay Collection.* When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final together with interest thereon as provided in Section 3297.

(g) *Same—Further Conditions.* If the bond is given before the taxpayer has filed his petition with the Board under section 3272(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such subsection, then the amount of the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subsection.



(h) *Waiver of Stay.* Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond, and is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(i) *Collection of Unpaid Amounts.* When the petition has been filed with the Board and when the amount which should have been assessed has been determined by a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 3322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

(j) *Claims in Abatement.* No claim in abatement shall be filed in respect of any assessment in respect of any tax imposed by this title."



## U. S. C. A., Title 26, Section 2322:

## REFUNDS AND CREDITS—

“(a) *Authorization.* Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance—*

(1) *Period of Limitation.* No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of credit or refund.* The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

(c) *Effect of Petition to Board.* If the Commissioner has mailed to the taxpayer a notice of deficiency under section 3272(a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and



(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment Found by Board.* If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

(e) *Tax Withheld at Source.* For refund or credit in case of excessive withholding at source, see section 3143(f)."

U. S. C. A., Title 31, Section 227, as amended March 3, 1933, Chapter 212, Title 11, Section 13, 47 Stat. 1516:

"Offsets against judgments and claims against United States.—When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of



such judgment equal to the debt thus due the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

#### IV.

##### ASSIGNMENTS OF ERROR.

1. The Court erred in ruling and holding that petitioner's petition was bad in substance.
2. The Court erred in overruling petitioner's demurrer to respondent's answer.



3. The Court erred in holding and ruling that respondent had any discretion or right to deny the petitioner his refund of income taxes overpaid for the year 1929.

4. The Court erred in denying the prayers of the petitioner and refusing the issuance of the writ of mandamus.

5. The Court erred in not holding respondent's answer set out no defense to petitioner's petition.

6. The Court erred in not ordering the clerk of the Court to issue a peremptory writ of mandamus directing the respondent to repay to the petitioner the income taxes for the year 1929, illegally and unlawfully collected and withheld by the respondent.

7. The Court erred in not ruling and holding that the respondent had no discretion and no right to refuse to repay to petitioner the income taxes for the year 1929, illegally and unlawfully collected and withheld by respondent.

8. The Court erred in not holding and ruling that petitioner was entitled to have repaid to him by respondent the income taxes for the year 1929, illegally and unlawfully collected and withheld by respondent.

9. The Court erred in holding and ruling that respondent had any discretion or right to refuse to repay to petitioner income taxes for the year 1929, illegally and unlawfully collected and withheld by respondent.

10. The Court erred in passing and entering the order of January 3, 1934 (R. 14 and 15).

## V.

### QUESTION AT ISSUE.

1. The appellee had no lawful authority to credit on appellant's judgment refund claim, disputed additional taxes for the calendar year 1928, which were not involved in the suit in which the judgment was decreed.

## VI.

### ARGUMENT.

The appellee makes defense to this cause of action that Section 322 of the Revenue Act of 1928 makes it mandatory that he deduct from the judgment claim of the appellant, the amount of alleged taxes claimed by the United States for the calendar year 1928.

The section referred to provides that where there has been an overpayment of any tax, the amount of such overpayment shall be credited against any other taxes then due from the taxpayer and then the appellee reasons that, because Section 56 of the Revenue Act of 1928 provides that the total amount of the taxes imposed under the Act shall be paid during the year in which the return was to be filed and by reason thereof the appellant owed any additional taxes assessable for the year 1928 during 1929, and



notwithstanding the fact that the amount of taxes owed for 1928 had not been finally settled, the appellee was required to withhold any refund in excess of the claimed taxes for 1928.

The Revenue Act of 1928 must be construed in its entirety and full meaning given to all sections consistent with harmony. *Dukinsky v. Beeker*, 64 F. (2d) 601.

Applying this rule to the Act in question the interpretation placed thereon by the appellee must fail. Section 271 of the Act defines a deficiency in taxes as being the difference between the tax shown by the taxpayer on his return and that finally assessed by the Commissioner.

After a deficiency in taxes is determined Section 272 authorizes a review of the determination of the Commissioner by the Board of Tax Appeals.

Section 272(a) of the Act provides that no assessment of a deficiency or any proceeding for its collection shall be made, begun or prosecuted until after expiration of the time of consideration of the Board and the taxpayer under this section is authorized to prevent the Commissioner by injunction from taking any steps to collect the alleged deficiency notwithstanding the provisions of Section 3224 of the Revised Statutes.

It is clear from considering Section 272(a) in connection with 56(a) of the Act that the time of payment of a deficiency is controlled by the former rather than the latter statute, and its due date is



fixed by Section 272 instead of Section 56. The right of the taxpayer to contest the tax before payment would be destroyed if the Commissioner could offset the alleged tax for one year against an adjudicated refund for another year.

Subsection (a) of Section 273 of the Act empowers the Commissioner to make a jeopardy assessment if, in his opinion, the collection of the tax will be delayed while awaiting decision of the Board. Construing the whole Act together, there is no escape from the conclusion that Section 56 relates only to the taxes due on the original return.

If the Congress had left the word "then" out of Subsection (a) of Section 322 of the Revenue Act of 1928, and used only the word "due," it would have been clear that it intended to require the credit to be applied against the taxes owing, but when the adverb "then" was used to modify "due," it is certain that Congress meant that the credit should be applied only against taxes then immediately payable and collectible. In construing the various sections of the Act in relation to each other and giving effect to the purpose of each section, the words "then due" as used, meant taxes which the United States could immediately demand from the taxpayer. *Ely v. Pearlman*, 143 Atl. 548, 549, 103 N. J. Eq. 425; *Collins, Admr., v. Janey*, (Va.) 3 Leigh 389, 391.

At the time appellee's action was filed in the District Court at Louisville, Kentucky, the deficiency claimed for 1928, had already been asserted by the



Commissioner and the petition for review was pending before the Board of Tax Appeals. The question of what tax, if any, the appellant owed for the calendar year 1928 could have been litigated in the suit in the United States District Court. It would seem on conscience that a high-minded Government would have counterclaimed in the Court and then said to the appellant, "you are indebted to the United States for taxes owed in a previous year" and if this had been done, the liability of the appellant for each of the years could have been determined in one action. The right of set-off was clear. *McKnight v. U. S.*, 98 U. S. 179, 25 L. Ed. 115; *Gratiot v. U. S.*, 15 Peter, 336, 10 L. Ed. 759; *Allen v. United States*, 17 Wall. 207, 21 L. Ed. 553; *United States v. Burchard*, 125 U. S. 176, 31 L. Ed. 662.

The appellee may urge that the right of set-off did not exist because this was a suit against the Collector and not against the United States, but a certificate of probable cause was issuable and in that event it became a claim against the United States. In any event, the case was in effect one against the United States. The command of the Commissioner, the superior of the Collector, to collect the tax relieved the Collector of all personal liability. *Moore Ice Cream Company v. Rose*, 289 U. S. 373, 384, 77 L. Ed. 1265.

The United States had the full power to counterclaim without having demanded the payment of any



additional taxes due for 1928. *New York Life Insurance Company v. Anderson*, 251 F. 578.

The United States is within the rule in this case where the party undertakes to avoid the collection of a judgment by a counter-demand which was due and in existence from the judgment debtor to the creditor at the time the judgment was obtained. The appellant is solvent and the collection of the tax not jeopardized. The United States is in the position of a private suitor when it consents that it may be sued, and by implication agrees that justice may be done with regard to the subject matter of the litigation. *Luckenbach S. S. Company v. Norwegian Barque Thekla*, 266 U. S. 327, 342, 69 L. Ed. 313, 316. Therefore this case is to be decided on the same principle as where a judgment debtor undertakes to satisfy the judgment by a counterclaim or set-off.

The Commissioner and the Collector being officials of the United States and acting under the authority of its laws, an estoppel that would operate against the United States would likewise operate against them or vice versa. *Tate v. Western Maryland R. R. Company*, 289 U. S. 619, 627, 77 L. Ed. 1405, 1410.

A court of equity would refuse to interfere with the collection of appellant's judgment if it had been obtained in an action between individuals and the defendant had sought to off-set a debt under the facts similar to those in this action and the same prin-



ciple of law should be applicable to the appellee. He should not be permitted to off-set by his own uncontrolled act when a Court of law would be without authority to give relief. *Edmonson v. Best*, 57 F. 531, 18 U. S. appeal 288; *Creath v. Sims*, 46 U. S. (5 How.) 192, 12 L. Ed. 110.

In the *Creath* case the Supreme Court said:

“Whenever therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission to the encouragement of useless and expensive litigation and perhaps to the subversion of justice.”

After a judgment is obtained the defendant is without power to offset it with another claim unless he shows his claim cannot be otherwise collected. If the defendant refused or failed to avail himself of the set-off or counterclaim in the action in which the judgment was claimed he is estopped to defeat the collection of the judgment by set-off or counterclaim. 34 C. J. 467, paragraph 734.

The appellee insists that this Court in the case of *McCarl, Comptroller, v. Leland*, 42 F. (2d) 346, decided the identical question here for decision in this case and that before this Court can decide for appellant it must overrule the *McCarl* case.

The facts in that case are different from the facts in the case at bar. In the *McCarl* case the Commissioner of Internal Revenue (appellant) in a written communication addressed to the appellee,



notified him that his income tax liability for the years 1918 and 1919 disclosed "a deficiency in tax of \$60,190.16 for 1918 and an overassessment of \$30,828.43 for 1919, as shown in the attached statement." Appellee appealed to the Board of Tax Appeals as to the deficiency tax for 1918 and on January 20, 1930, the Board affirmed the decision of the Commissioner.

On September 4, 1929, the Commissioner forwarded to the Comptroller General a schedule for \$30,828.43 as refund to appellee of taxes erroneously collected for the year 1919 with \$16,941.95 interest. This schedule was accompanied by a communication addressed to the Comptroller General notifying him of the deficiency assessment of \$60,190.16 for 1918. The Comptroller General refused to approve the voucher for refund and refused to transmit it to the disbursing clerk of the Treasury Department for payment. The appellee sued to compel the Commissioner to return the schedule to the Comptroller to certify the same for payment.

In the cited case, the determination for the two years was simultaneous and the Commissioner found an overpayment for one year and an underpayment for the next year. It was not a judgment claim. In that case the claim for additional taxes did not draw interest until after the tax was assessed. In the case at bar, both the deficiency in taxes, if any, and the refund claim bear interest. If a deficiency is found by the Board of Tax Appeals, six per cent



interest is due thereon from the date the tax was paid on the original return and the judgment refund bore interest from the date the tax was overpaid.

The Court in the opinion in the Leland case emphasizes the fact that the Commissioner's notification to the appellee determined both the overassessment and the deficiency. The Court bases its conclusion in undertaking to state the intent of the Congress, on the fact that the refund or overassessment did bear interest and the deficiency did not. In the opinion the Court said:

“Any other interpretation would permit the taxpayer, through the medium of an appeal from the Commissioner's determination of a deficiency to exact from the Government interest when the net balance was against him. Such a result would be inequitable and inconsistent with the obvious purpose of the Statute.”

There is no such reasoning applicable to the case at bar and if the reason for the rule is gone, the rule must fail because it is without foundation.

The Board of Tax Appeals was not in existence under the Revenue Act of 1918 and no remedy was afforded the taxpayer by an appeal to any administrative tribunal after an adverse decision by the Commissioner.

Regulations 45, Article 1032, authorized a taxpayer before paying the tax, but after assessment by the Commissioner, to file claim in abatement on Form 47 and have a rehearing before the Commis-



sioner before paying the tax. We think the history of this procedure is important in distinguishing the case at bar from the Leland case. This article is as follows:

“Article 1032. Claims for abatement of taxes erroneously assessed.—Claims by the taxpayer for the abatement of taxes or penalties erroneously or illegally assessed or abatable under remedial acts shall be made on form 47 (revised). They must be sustained by the affidavits of the parties against whom the taxes were assessed, or of other parties cognizant of the facts. When a tax has been assessed and turned over to the collector, the presumption is that the assessment is correct. The burden of proof in rebutting the presumption and showing that it was improperly or illegally assessed, or that relief should be given under remedial statute, rests upon the applicant for abatement. The affidavits must therefore contain full and explicit statements of all the material facts relating to the claim in support of which they are offered and to the proper consideration of which they are essential. The legality of the claim is to be determined by the Commissioner upon the facts presented by the affidavits. The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund. See further Regulations No. 14 (revised). A collector may himself present once a month a blanket claim on form 47 (revised) for the abatement of taxes coming within certain classes of taxes erroneously assessed.”



Subsection (j) of Section 273 of the Revenue Act of 1928 provides "no claim in abatement shall be filed in respect of any assessment in respect of any tax imposed by this title."

The prohibition of filing abatement claims clearly shows that the Congress intended to withdraw that remedy from the taxpayer and afford him one more effective by creating the Board of Tax Appeals, an independent administrative body to which he could appeal before paying the tax and the fact that the Government is entitled to interest on a deficiency from the date the tax was paid on the original return to the collection thereof and the taxpayer is entitled to interest on the overassessment from the date of the overpayment to the date of refund, overthrows the reason for the rule in the Leland case.

If Congress had intended to prohibit the Commissioner from making a refund on a judgment claim until taxes for prior years were finally settled, it would have said so. Any other interpretation destroys the well-recognized rule that revenue laws must be liberally interpreted for the benefit of taxpayers. To paraphrase the expression used in the Leland opinion that "the taxpayer may exact from the Government an immediate refund, with interest on the amount from the date of the overpayment although it is finally determined that at the time of the overpayment there was due the Government twice the amount," can the Commissioner of Internal Revenue avoid a refundment of taxes judicially



found to have been overpaid by simply sending a letter to the taxpayer that he has underpaid his taxes for prior years when it may be found by the Board of Tax Appeals on a hearing that he owes no deficiency.

The Leland opinion is not controlling in this case, because it involved taxes under the Revenue Act of 1918 with different periods of interest and a different state of facts. In *Tull & Gibbs v. United States*, 48 Fed. (2d) 148, the Leland opinion was approved but the years involved in the Tull case are also 1918 and 1919 and fall within the rule laid down in the Leland case.

In the case of *United States v. Woolner Distilling Company*, 52 F. (2d) 666 (D. C.) Ill., the Commissioner found an overpayment for 1918 and a deficiency for 1917. By oversight, the Commissioner and Collector failed to credit the overassessment against the previous year's deficiency and refunded the entire overassessment to the taxpayer. The United States then sued to recover so much of the refund as represented the deficiency for 1917 and the taxpayer claimed the suit was barred by limitation. The Court held it was the duty of the Commissioner to have credited the refund for 1918 on the 1917 deficiency and consequently the Statute of Limitations should have run from the time the credit should have been made and not from the date of the return. In this case the two years were settled



and the amount due ascertained. There was no controversy about any of it, as in the case at bar.

We believe a fair interpretation of the related sections of the Revenue Acts of 1928 requires the Commissioner to refund all overpayments of taxes without off-set except where the deficiency owed by him has been finally determined or where a jeopardy assessment has been made. Unless this interpretation is given to the Statutory law involved, so much of Subsection (a) of Section 272 of the Revenue Act of 1928 which provides:

“No assessment of a deficiency in respect to the tax imposed by this title and no distraint or proceeding in Court for its collection, shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period nor if a petition has been filed with the Board until the decision of the Board has become final, notwithstanding the provisions of Section 154 of this title the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper Court,”

becomes a nullity and leaves the taxpayer without any benefit from an appeal to the Board of Tax Appeals.

The appellee in his answer also relies on the Act of March 3, 1875, 18 Stat. 481, U. S. C. A. 31, Section 227, as amended March 3, 1933, Chap. 212, Title 2, Section 1347, Stat. 1516, as requiring him to withhold so much of the refund as represents the



deficiency for the previous year. This Act must be construed in connection with the Revenue Act of 1928 and when this is done it is inapplicable to the case at bar.

In *Old Colony Trust Company v. Commissioner of Internal Revenue*, 279 U. S. 716, 73 L. ed. 918, the Supreme Court said:

“The Board of Tax Appeals \* \* \* was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue’s determination of additional income and estate taxes by the Board in advance of paying the tax found by the Commissioner to be due.”

If the action of the Commissioner in the case at bar is sustained the appellant is deprived of his right to have a review of the Commissioner’s determination before paying the tax. In the case of *Lafayette Worsted Company v. Page*, 6 F. (2d) 399, the Court enjoined the collection of the tax where an appeal was pending before the Board indicated and in so doing, said:

“It can hardly be that the Commissioner is the sole and final judge of his own jurisdiction as between himself and an independent, supervisory tribunal established by Statute, nor is he at liberty to disregard the explicit provisions of law curtailing his power.”

In the case of *Peerless Woolen Mills v. Rose*, 28 F. (2d) 661, the Court in enjoining the Commissioner from proceeding to collect taxes pending an ap-



peal before the Board, referring to Section 274(a) of the Revenue Act of 1926, said:

“That Section prohibits a proceeding by distraint until the decision of the Board has become final and confers upon the District Court of the United States jurisdiction to enjoin the collection of the tax notwithstanding the provisions of R. S. #3224.”

The United States sustains no loss and loses no right by being compelled to await the determination of the Board of Tax Appeals as to the liability of the appellant for the calendar year 1928. On the other hand if the appellant is compelled to pay the full demand of the Commissioner for taxes he does lose the right to have the tax finally determined by the Board before payment.

We respectfully submit the decision of the lower Court is in conflict with the law and should be reversed.

ANDREW T. SMITH,

LEWIS H. BARNES,

ELWOOD HAMILTON,

*Counsel for Appellant.*





MAY 23 1934

No. 6185

*Henry W. Hodgson*  
CLERK

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**In the Court of Appeals of the District of  
Columbia**

JANUARY TERM, 1934

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THE UNITED STATES OF AMERICA EX RELATIONE  
WHITEFOORD R. COLE, APPELLANT

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, APPELLEE

---

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT  
OF COLUMBIA

---

**BRIEF FOR THE APPELLEE**

---

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# **In the Court of Appeals of the District of Columbia**

JANUARY TERM, 1934

---

No. 6185

THE UNITED STATES OF AMERICA EX RELATIONE  
Whitefoord R. Cole, appellant

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
Revenue, appellee

---

*ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT  
OF COLUMBIA*

---

## **BRIEF FOR THE APPELLEE**

---

### **OPINION BELOW**

This case is before the Court on appeal from a judgment of dismissal following an order (R. 14) overruling a demurrer (R. 13) to the answer of the appellee to a rule to show cause (R. 10), and petition for mandamus (R. 2) to compel the appellee to issue a certificate of overassessment and Treasury check for \$6,838.79, together with interest to be paid out of the Treasury of the United States.

### JURISDICTION

The appeal in this case involves income taxes of Whitefoord R. Cole for the year 1929 in the sum of \$6,838.79, and is taken from a judgment of the Supreme Court of the District of Columbia, made and entered January 3, 1934, dismissing the petition for mandamus and discharging the rule to show cause (R. 14). The case is brought to this Court by notice of appeal given in open court by the appellant on January 3, 1934 (R. 14), pursuant to the Code of the District of Columbia, c. 2, Title 18, Sec. 26.

### QUESTION PRESENTED

Whether Section 322 (a) of the Revenue Act of 1928 requires the immediate refund to the taxpayer of an overpayment of taxes for the year 1929, notwithstanding the determination by the Commissioner of Internal Revenue of a deficiency in taxes for the year 1928, from which an appeal was taken to the United States Board of Tax Appeals, which appeal is now pending.

### STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp 27-33.

### STATEMENT

On or before March 15, 1930, the appellant, Whitefoord R. Cole, filed his income-tax return for the calendar year 1929, showing a tax liability of



\$25,017.43, which was duly assessed and paid (R. 2, 10). Thereafter, on March 3, 1932, the then Commissioner of Internal Revenue determined and assessed against appellant an additional tax of \$10,126.37, for the year 1929, which the appellant paid to the Collector of Internal Revenue on May 14, 1932, together with interest amounting to \$1,290.76 (R. 2-3, 10).

On June 15, 1932, appellant commenced suit in the United States District Court for the Western District of Kentucky, against E. S. Helburn, Collector of Internal Revenue for the District of Kentucky, for the sum of \$9,693.23, together with interest (R. 3, 10). Judgment was entered therein in favor of appellant on April 7, 1933, for the sum of \$8,269.03, besides interest at the rate of six per cent per annum from May 14, 1932. A certificate of probable cause was entered by the court in this case (R. 3, 10). From this judgment an appeal was filed with the United States Circuit Court of Appeals for the Sixth Circuit on June 10, 1933, which appeal was thereafter on October 4, 1933, dismissed on motion of the defendant collector (R. 3, 10).

On April 8, 1933, appellant filed a judgment claim for refund in the sum of \$8,269.03, plus interest and costs, whereupon, on July 17, 1933, appellee issued a certificate of overassessment, and at the same time delivered to appellant a Treasury check for



\$1,548.66 (R. 3, 11). The certificate of overassessment bore the notation (R. 4, 11):

Less amount withheld in connection  
with proposed deficiency for 1928\_ \$6,838.79

On January 29, 1931, the then Commissioner of Internal Revenue asserted against the appellant a deficiency in income taxes for the calendar year 1928 in the sum of \$5,807.54, from which asserted deficiency the appellant filed an appeal to the United States Board of Tax Appeals, which appeal is still pending (R. 4, 11).

On October 3, 1933, appellant filed in the Supreme Court of the District of Columbia his petition for writ of mandamus to compel the appellee to issue a certificate of overassessment for \$6,838.79, together with interest to be paid out of the Treasury of the United States (R. 2-10), upon which petition, the court on said date issued its rule to show cause (R. 10). To the petition and rule to show cause appellee filed on October 12, 1933, appropriate answer and return (R. 10-12). On December 4, 1933, appellant filed a demurrer to the answer filed by appellee (R. 13), which demurrer was by the court on December 29, 1933, overruled (R. 14). The appellant elected to stand on his demurrer, whereupon the court on January 3, 1934, ordered the petition dismissed and the rule discharged, and entered judgment for appellee for his costs (R. 14). From the judgment of dismissal appellant has appealed to this Court (R. 14).



## SUMMARY OF ARGUMENT

There is no statute authorizing the refund of an overpayment of taxes for any year to a taxpayer while the taxpayer is indebted to the United States for taxes due for some other year. Congress has provided by plain and unambiguous statutes that before refund shall be made of any overpayment of taxes, the taxes due the Government from a taxpayer must first be liquidated out of the overpayment. Taxes were due the Government from appellant for the year 1928, in the approximate amount of the overpayment withheld for the year 1929.

Courts will take judicial notice that the Commissioner of Internal Revenue is not the disbursing officer of the Treasury, authorized to draw or issue Treasury checks in payment for the refund of an overpayment in taxes erroneously collected, nor has any other officer of the Government such authority until the claim has been approved by the Comptroller General of the United States.

The total amount of tax imposed by the Revenue Act of 1928 becomes due on the fifteenth day of March following the close of the calendar year. In the event of the determination and assessment of a deficiency, such deficiency bears interest from the date the original tax became due, which conclusively establishes that the deficiency here was "then due" on March 15, 1929. The filing of an appeal with the United States Board of Tax Ap-

peals merely results in a review by the Board of the action of the Commissioner and does not extend the due date of the tax.

Appellee is forbidden by statute from refunding the overpayment involved in this suit, and any action by him would be ineffective in the face of this statute. The Comptroller General must audit and approve any refund before disbursement is made from the funds of the United States. Since a certificate of probable cause was issued in the suit against the Collector in the United States District Court, the claim in controversy is one against the United States. The appellant cannot suffer from the withholding of the overpayment, because in the event he should prevail in his appeal before the Board of Tax Appeals, he will receive interest on his claim from the date of his alleged overpayment.

#### ARGUMENT

##### I

**No statutory authority exists for the refund of an overpayment of taxes for any year to a taxpayer while such taxpayer is indebted to the United States for taxes due for another year**

The appellant sought to have the court below by writ of mandamus compel the Commissioner of Internal Revenue to issue a certificate of over-assessment and Treasury check for \$6,838.79, with interest, for an overpayment of income taxes for the year 1929, notwithstanding the fact that appellant was and is indebted to the United States for



additional income taxes for the year 1928, and with reference to which the appellant delayed payment by filing an appeal to the United States Board of Tax Appeals, which appeal is still pending.

Before funds of the sovereign can be disbursed there must be specific statutory authority for so doing. The Congress has spoken specifically in enacting Section 322 (a) of the Revenue Act of 1928, *infra*, p. 29. This statute is plain and unambiguous. It provides that before refund shall be made of any overpayment of taxes, the taxes due the Government from a taxpayer must first be liquidated out of the overpayment. There are taxes due the United States from appellant for the year 1928, in the approximate amount of the overpayment for 1929 withheld from refund.

In passing, attention is directed to the prayer of the petition (R. 5), where appellant prays, among other things, that the appellee be compelled to issue "Treasury check." Courts will take judicial notice that the Commissioner of Internal Revenue is not the disbursing officer of the Treasury, authorized to draw or issue Treasury checks in payment of overpayments of taxes erroneously collected. Nor has any other officer of the Government such authority until the claim has first been approved by the Comptroller General of the United States.

This case presents a simple question which has already been passed upon by this Court in an identi-



cal case. *McCarl v. Leland*, 42 F.(2d) 346, certiorari denied, 282 U.S. 839. There the Commissioner, by letter dated March 30, 1926, advised the taxpayer of the determination of a deficiency of \$60,190.16 for the year 1918, and of an overassessment of \$30,828.43 for 1919. The taxpayer appealed to the United States Board of Tax Appeals from the deficiency asserted. On September 4, 1929, the Commissioner forwarded to the Comptroller General a schedule for \$30,828.43 as a refund of taxes erroneously collected for the year 1919, with \$16,941.45 interest. An accompanying communication to the Comptroller General notified him of a deficiency of \$60,190.16 for the year 1918, and of the appeal therefrom pending before the Board of Tax Appeals. The Comptroller General refused to "preaudit approve" the voucher for refund and refused to transmit it to the disbursing clerk of the Treasury Department for payment. The taxpayer sought by mandamus to compel payment. The position of the taxpayer there is identical with the position taken by appellant here. This Court stated that position as follows (p. 347):

It is the position of appellee that, because the refund could not be credited to the deficiency assessment until the decision of the Board had become final, the deficiency tax was not "then due" when the Commissioner on March 30, 1926, determined the amount of the overassessment for 1919, and that therefore the amount of the overassessment



should have been "refunded immediately to the taxpayer," with interest. In other words, by prosecuting an appeal from the Commissioner's deficiency assessment the taxpayer may exact from the government an immediate refund, with interest on the amount from the date of the overpayment, although it is finally determined that at the time of the overpayment there was due the government twice the amount.

Continuing, this Court answered the taxpayer's position as follows (p. 347) :

In the communication of March 30, 1926, from the Commissioner to appellee, notifying appellee of the overassessment for 1919, the Commissioner also notified him of the deficiency assessment for 1918 (due March 1919). The ruling as to the deficiency assessment was *prima facie* correct. *Neiman-Marcus Co. v. Lucas*, 59 App.D.C. 328, 41 F. (2d) 300, decided May 5, 1930; *United States v. Anderson*, 269 U.S. 422, 46 S.Ct. 131, 70 L.Ed. 347; *Wickwire v. Reinecke*, 275 U.S. 101, 48 S.Ct. 43, 72 L.Ed. 184; *Williamsport Wire Rope Co. v. United States*, 277 U.S. 551, 48 S.Ct. 587, 72 L.Ed. 985; *Avery v. Commissioner* (C.C.A.) 22 F. (2d) 6, 55 A.L.R. 1277; *Brown v. Commissioner* (C.C.A.) 22 F. (2d) 797; *Rieck v. Heiner* (C.C.A.) 25 F. (2d) 453; *Henderson Iron Works & Supply Co. v. Blair*, 58 App.D.C. 114, 25 F. (2d) 538; *Bishoff v. Commissioner* (C.C.A.) 27 F. (2d) 91; *Green's Advertising Agency v. Blair* (C.C.A.) 31 F. (2d) 96.



The Court then concluded (p. 347) :

Prima facie, therefore, the amount of the deficiency assessment was "then due" the government, but owing to the appeal taken by the taxpayer the final balancing of the account could not be had until the termination of the appeal.

In our view it was the intent of Congress in the enactment of section 284 to require immediate refund of overpayments only in the event of a net balance in favor of the taxpayer.

It is true that the Court states *in extenso* (p. 347) :

The inequity of appellee's position is still more apparent when it is noted that the government could exact interest on the deficiency assessment from February 26, 1926, only.

\* \* \* In other words, the government would be compelled to pay interest from the date of the overpayment to approximately the date of the refund, \* \* \* while it could exact interest on the deficiency assessment from February 26, 1926, only.

Regardless of the reference to the equities of the case by this Court, it is submitted that the decision is not based upon a restriction of equitable consideration, but is predicated upon the sound theory that the statute did not contemplate a refund to a taxpayer by the Government while the taxpayer is indebted to the Government.

In his brief, appellant attempts to distinguish the *Leland* case from the case at bar. In criticizing the



soundness of the conclusion reached in that case, appellant says (Br. 25) :

The Board of Tax Appeals was not in existence under the Revenue Act of 1918 and no remedy was afforded the taxpayer by an appeal to an administrative tribunal after an adverse decision by the Commissioner.

Nevertheless, the fact remains that although the asserted deficiency was for the year 1918, the deficiency was not asserted until March 26, 1926, more than two years after the Board of Tax Appeals was created, and the taxpayer in that same case prosecuted an appeal to the Board of Tax Appeals, which Board appellant asserts "was not in existence under the Revenue Act of 1918 and no remedy was afforded the taxpayer by an appeal." It is submitted that the *Leland* case cannot be distinguished from the case at bar.

The applicable statute to this case, so far as the year 1928 is concerned, is the Revenue Act of 1928. Section 1 of that Act provides that—

The provisions of this title shall apply only to the *taxable year 1928 and succeeding taxable years.* \* \* \* (Italics supplied.)

Section 51 requires the filing of returns by individuals, and Section 56 specifies the time for payment of the *total tax* imposed by the Revenue Act of 1928. From this section it will be seen that the entire amount of tax due from appellant was due and owing March 15, 1929, when he filed his return. *Riverside & Dan River Cotton Mills v. United States*, 37



F. (2d) 965 (C.Cls.), certiorari denied, 282 U.S. 838. Section 57 provides that as soon as practicable after the return is filed the Commissioner shall examine it and determine the correct amount of tax.

Section 272 relates to the right of the taxpayer to file a petition with the Board of Tax Appeals in the event a deficiency is determined as a result of the audit of the return, and permits an appeal from the determination of the Commissioner to the Board of Tax Appeals and withholding payment of the deficiency until the decision of the Board shall become final. However, from Section 272 (i), it will be observed that in the event a taxpayer has elected to pay his original tax in installments, after the deficiency has been assessed, the deficiency shall be prorated to the four installments. A reading of the Revenue Act of 1928 in sequence is compelling of the conclusion that all of the tax for the year 1928 was due and payable on March 15, 1929, and that it was "then due." This is further conclusively established by Section 292 of the Revenue Act of 1928, which provides:

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the



first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed, whichever is the earlier.

Thus it will be seen that the deficiency bears interest from the date prescribed for the payment of the tax, which here is March 15, 1929. It would be unusual for an obligation to bear interest before it is due. Hence, both the tax shown in the return and the deficiency were due March 15, 1929. While the determination and also the payment is deferred by the appeal to the Board of Tax Appeals, nevertheless the Act comprehends that the tax was "then due" on March 15, 1929. No reading or construction of the Acts of 1928 and 1932 will produce the conclusion that because a beneficent Congress has permitted delay in the determination and payment of a tax until there has been first an adjudication by the Board of Tax Appeals, it intended that the United States Government was to make a refund to a taxpayer of an overpayment of tax for one year while that taxpayer owed the Government of the United States additional taxes for another year. The provisions of Section 322 (a) of the Revenue Act of 1928 are explicit in providing that—

Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited



against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

It should be remembered that no harm is being done the appellant by the delay. He will receive his interest on the amount of the overpayment of taxes. It should not be overlooked that it is possible that one or more years may yet elapse before the appeal pending before the Board for the redetermination of the 1928 deficiency has been decided, and when the decision is rendered by the Board, it is conceivable that a petition for review may be filed with the Circuit Court of Appeals, or even the case may be carried to the Supreme Court of the United States. Thus, several years may elapse before the Government may collect its taxes from the appellant. Appellant has alleged that he is solvent (R. 4). The parties have stipulated this to be a fact (R. 13). He may have been solvent when this proceeding was filed. He may be solvent today. Will he be solvent tomorrow? Will he be solvent when the Government is permitted to collect the deficiency now pending before the Board of Tax Appeals?

Appellant refers to Section 273 (a) of the Revenue Act of 1928, providing for jeopardy assessments, and points out that in cases where the collection of the tax may be jeopardized, the Commissioner may make an immediate assessment (Br.



20). While this is true, no occasion appeared at the time of the assertion of the deficiency here involved to make a jeopardy assessment, because the appellant was then solvent. In any event, the Government was and is protected by withholding so much of the overpayment for 1929 as will, in the event the Board of Tax Appeals affirms the determination of the Commissioner, be sufficient to liquidate the additional taxes due for the year 1928. This is the practical answer to the entire question of whether the Government should be compelled to immediately refund taxes for one year when a taxpayer is indebted to the Government for additional taxes for another year, which taxes the Government is unable to collect, because of the pendency of an appeal to the Board of Tax Appeals, until such appeal has been decided and until the decision thereof has become final.

Appellant refers to the equities discussed by this Court in *McCarl v. Leland, supra*, relating to differential in interest (Br. 25). Here it is not a question of differential in interest, whether the taxpayer or the Government would receive more in interest in crediting of taxes, but it is a question of sound principle, based upon public policy, that the Government should not be required to refund overpayments for certain years while the same taxpayer owes the Government taxes for other years, the collection of which cannot be made during the pendency of an appeal before the Board of Tax Ap-



peals. In anticipation of the possibility of a large number of such cases as the one at bar, Congress wisely enacted Section 322 (a), *supra*, to prevent the enormous losses in revenue to the Government which could have occurred had some such safeguard not have been provided.

The question here presented is not new to this Court. To the same effect in principle as *McCarl v. Leland*, *supra*, is *Lucas v. Blackstone Mfg. Co.*, 45 F. (2d) 291, where it appeared that the taxpayer overpaid its 1917 taxes, but that the Commissioner did not schedule this sum as an overpayment until November 26, 1927. On October 18 1927, the taxpayer paid a 1918 deficiency after a decision had been rendered against it by the Board of Tax Appeals. However, the Commissioner refused to accept this payment as a settlement of the deficiency, inasmuch as the overpayment for 1917, and also an overpayment of 1919, were not yet disposed of, and held that the deficiency and overpayment should be settled against one another in an adjustment of the respective claims. Compare *York Safe & Lock Co. v. United States*, 69 C.Cls. 529, certiorari denied, 282 U.S. 839; *Standard Oil Co. v. United States*, 5 Fed. Supp. 976 (C.Cls.). See *Tull & Gibbs v. United States*, 48 F. (2d) 148 (C.C.A. 9th).

The cases cited by appellant in definition of the term "then due" (Br. 20) are not in point. Neither of these cases is an interpretation of a Federal taxing statute, and the fact background in each case is



so far removed from the question under consideration as to make these cases worthless as authority on the point for which they are cited.

Appellant contends that the Government had a right of set-off in the case before the United States District Court, and that the liability of appellant for each of the years could have been determined in one action (Br. 20-23). This contention is untenable. The proceeding before the Board of Tax Appeals for redetermination of the deficiency for 1928 had been instituted long before the court action was commenced. The Board had jurisdiction of the controversy in so far as it affected the deficiency for 1928, and the court was without right to interfere. Besides, the court action was against the Collector and was not an action against the United States; hence the United States could not counterclaim nor plead an off-set. The authorities cited by appellant in support of this contention are not in point. The suit in the District Court was not a suit against the United States, and the judgment against the Collector did not become a claim against the United States until the court had issued its certificate of probable cause. Attached to the petition as Exhibit I is a copy of the judgment entered in the District Court for the Western District of Kentucky. It will be observed that this judgment provides that (R. 6):

*no execution issue against the defendant for any part of this judgment; that said is a*



*claim against the United States of America and shall be paid in the form and manner as provided by law.* (Italics supplied.)

The certificate of probable cause is authorized by Section 989 of the Revised Statutes, *infra*, p. 32. Such a declaration by a court makes the United States liable for the payment of the judgment. It is well established that a suit against a collector of internal revenue to recover taxes alleged to be illegally or wrongfully collected is a personal action up to the filing of a certificate of probable cause by the court after rendering judgment against the Collector. Under the provisions of the statute (Sec. 989, Revised Statutes), the claim thereupon becomes one against the United States. It is only under such authority that the funds could be paid from the Treasury of the United States. Section 989 of the Revised Statutes is more than an indemnifying statute, for it prohibits the issuance of execution against a collector where a judgment is recovered against him in such a case, and provides for the payment (refund) by the United States of the amount recovered, because the money was paid into the Treasury and fairly could only be refunded from the Treasury upon claims against the United States. Thus, in *United States v. Sherman*, 98 U.S. 565, it was said (p. 567):

The act of Congress enacts that when the certificate of probable cause is given, the amount recovered shall, upon final judg-



ment, be paid out of the appropriation from the treasury. When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government. But not until then.

Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given.

This same statute was under consideration by this Court in *Mellon v. United States*, 36 F. (2d) 609, where it was said (p. 610):

The suit in this case against the collector was personal (*Sage v. United States*, 250 U.S. 33, 39 S.Ct. 415, 63 L.Ed. 828), but a certificate of probable cause was issued. Under section 989, Rev. St. (28 U.S.C.A. § 842), after the issuance of such a certificate "no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." Until the issuance of the certificate, the government assumes "no part of the liability of the defendant." Upon the issuance of the certificate, "the claim of the plaintiff in the suit is practically converted into a claim against the government. But not until then." *United States v. Sherman*, 98 U.S. 565, 567, 25 L.Ed. 235; *Schell v. Cochran*, 107 U.S. 625, 627, 2 S.Ct. 827, 27 L.Ed. 543.



Decisions affirming this principle are numerous, but no useful purpose could be gained by extending this brief to include quotations from all such cases. It should be sufficient to refer to the most recent utterance by the Supreme Court of the United States in *Moore Ice Cream Co. v. Rose*, 289 U.S. 373. Speaking for the Court, Mr. Justice Cardozo said (pp. 380-381):

As the law stood before later statutes, the taxpayer's protest was notice to a Collector that suit was about to follow, and was warning not to pay into the Treasury the moneys collected. *Elliott v. Swartwout*, *supra*; *Smietanka v. Indiana Steel Co.*, 257 U.S. 1, 4. Statutes first enacted in 1839 (Act of March 3, 1839, c. 82, § 2, 5 Stat. 348) and progressively broadened (R.S., § 3210; 26 U.S.C., § 140), made it the duty of Collectors to pay the money over to the Government, whether there had been protest or no protest. At first this was thought to have relieved them of personal liability (*Cary v. Curtis*, 3 How. 236; *Smietanka v. Indiana Steel Co.*, *supra*), but later acts of Congress established a different rule, though maintaining the duty to make remittance to the Treasury. *Philadelphia v. Collector*, 5 Wall. 720, 731; *Curtis's Adm'x v. Fiedler*, 2 Black 461, 479; *Collector v. Hubbard*, *supra*; *Arnson v. Murphy*, 109 U.S. 238, 241; 5 Stat. 727; 12 Stat. 434, 725, 729; 12 Stat. 741, § 12; 13 Stat. 239; 14 Stat. 329, § 8. Along with the duty there



went a pledge of indemnity by the Government itself, a pledge not absolute, it is true, but subject to a condition. 12 Stat. 741, § 12; *United States v. Sherman*, 98 U.S. 565; *Philadelphia v. Collector*, *supra*, p. 733; *Smietanka v. Indiana Steel Co.*, *supra*. The condition was that a certificate be granted by the court either (a) that there was probable cause for the act done by the Collector or other officer, or (b) that he acted under the directions of the Secretary of the Treasury or other proper officer of the Government. 12 Stat. 741, § 12; Act of March 3, 1863. In that event no execution was to issue upon the judgment, but the amount of the recovery was to be paid out of the Treasury. The pledge of indemnity was carried forward into the Revised Statutes with only verbal changes (R.S. 989) and stands upon the books today. 28 U.S.C., § 842. The effect of the certificate, when given, is to convert the suit against the Collector into a suit against the Government. *United States v. Sherman*, *supra*.

Relying upon *Tait v. Western Md. Ry. Co.*, 289 U.S. 620, appellant contends that (Br. 22)—

The Commissioner and the Collector being officials of the United States and acting under the authority of its laws, an estoppel that would operate against the United States would likewise operate against them or *vice versa*. (Italics supplied.)

This contention is fully answered by the Supreme Court in *Bankers Coal Co. v. Burnet*, 287 U.S. 308, where the Court said (pp. 311-312) :

In a suit brought by the petitioner in the District Court for Northern West Virginia, *Bankers Pocahontas Coal Co. v. White, Collector of Internal Revenue*, with respect to taxes for the years 1914 to 1919, it was held that petitioner was entitled to a depletion allowance on royalties received from the leases involved in the present suit, of 5¢ per ton of coal mined. It is insisted that the decision in that case was *res adjudicata* of that issue, and that in fixing the depletion allowance of the present case at 3.6¢ per ton, the court below and the Board of Tax Appeals erroneously refused to follow the decision of the District Court in the earlier case. With respect to this contention it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not *res adjudicata* against the Commissioner or the United States. *Graham & Foster v. Goodcell*, 282 U.S. 409, 430; *Sage v. United States*, 250 U.S. 33; see *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; compare *Union Trust Co. v. Wardell*, 258 U.S. 537.

Thus while a Collector may be estopped by a judgment against the Commissioner, the reverse is not true, and the Commissioner is not estopped by



a judgment against a Collector. Hence the contention by appellant that the United States should have offset its claim for deficiency of 1928 taxes against the overassessment for 1929 in the suit against the Collector in the District Court is without merit.

## II

### **Appellee is prohibited by statute from refunding the taxes involved in this suit**

While it is urged that the provisions of Section 322 (a), *infra*, p. 29, of the Revenue Act of 1928 are a complete defense in this cause, it is further urged that the provisions of the Act of March 3, 1875, as amended by the Act of March 3, 1933, *infra*, p. 31, absolutely forbid the refund of the taxes here involved. There it is provided that the Comptroller General of the United States is authorized to withhold payment of the amount of the judgment equal to a debt due the United States. Since the Commissioner of Internal Revenue, appellee herein, is the only defendant in this suit, any action by him would be ineffective in the face of this statute. The Court will take judicial notice of the fact that the Comptroller General must audit and approve any refund before disbursement can be made from the funds of the United States. This suggests that appellant has omitted an indispensable party in this cause. Regardless of this situation, it appears from paragraph 9 of the petition



that the appellee did issue a certificate of over-assessment in the amount of \$8,269.03, and that of this amount \$6,838.79 was withheld from refund in connection with the asserted deficiency for 1928, and that the certificate of overassessment authorized the refund of \$1,548.66, which appellant has received (R. 3-4). A copy of the certificate of overassessment is attached to the petition as Exhibit III. It must be assumed that this certificate received the approval of the Comptroller General prior to the issuance of a Treasury check by the disbursing clerk in the amount of \$1,548.66. It would thus appear that the Comptroller General approved the action of the Commissioner of Internal Revenue in limiting the refund of the overpayment for the year 1929 to the appellant, and for all practical purposes the requirements of the Act of March 3, 1875, as amended by the Act of March 3, 1933, *infra*, p. 31, have been served.

Appellee maintains that all the provisions of the Revenue Acts and statutes relating to a particular case and necessary to its adjudication must be considered and construed in their entirety. The appellant seeks to side-step the Act of March 3, 1875, as amended by the Act of March 3, 1933, by the argument that the statute does not apply to the case at bar. The statute is plain and unambiguous and requires no interpretation. Construing the applicable statutes together it is found that Section 322



(a) of the Revenue Act of 1928 requires "where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer"; that the tax for the year 1928 was due March 15, 1929, under Section 56 of the Revenue Act of 1928, read in conjunction with the other provisions of the Act; that the provisions of the Act of March 3, 1875, as amended by the Act of March 3, 1933, forbids the refund of an overpayment of tax for one year so long as there is a debt due the United States for additional taxes for another year; that the determination by the Commissioner of Internal Revenue of a deficiency in tax is *prima facie* correct and establishes a tax debt due the United States; that upon the issuance of a certificate of probable cause by a court in an action against a collector to recover income taxes overpaid, the claim against the collector is converted into a claim against the Government; and that the appellant does not suffer from such withholding of the overpayment, since his claim bears interest until payment is made.

#### CONCLUSION

The Supreme Court of the District of Columbia committed no error in overruling the demurrer to the answer and in dismissing the petition and dis-

charging the rule to show cause. The judgment and decision of the court below should be affirmed.

Respectfully submitted.

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MAY 1934.



## APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

### SEC. 1. APPLICATION OF TITLE.

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. \* \* \*

### SEC. 51. INDIVIDUAL RETURNS.

(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of \$1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income.

\* \* \* \* \*

### SEC. 56. PAYMENT OF TAX.

(a) *Time of payment.*—The total amount of tax imposed by this title shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment

shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

(c) *Extension of time for payment.*—At the request of the taxpayer, the Commissioner may extend the time for payment of the amount determined as the tax by the taxpayer, or any installment thereof, for a period not to exceed six months from the date prescribed for the payment of the tax or an installment thereof. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.

\* \* \* \* \*

#### SEC. 57. EXAMINATION OF RETURN AND DETERMINATION OF TAX.

As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

#### SEC. 271. DEFINITION OF DEFICIENCY.

As used in this title in respect of a tax imposed by this title "deficiency" means—

(a) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the



amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; \* \* \*

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. \* \* \*

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.



(b) *Limitation on allowance.*—

(1) *Period of limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has



expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

\* \* \* \* \*

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 322 (U.S.C.Supp. VII, Title 26, Sec. 322) is identical with Section 322 of the Revenue Act of 1928.

Act of March 3, 1875, c. 149, 18 Stat. 481 (U.S.C., Title 31, Sec. 227), as amended, March 3, 1933, c. 212, 47 Stat. 1516 (U.S.C.Supp. VII, Title 31, Sec. 227):

## TITLE II

SEC. 13. \* \* \*:

That when any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an



amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff. (U.S.C.Supp. VII, Title 31, Sec. 227.)

#### Revised Statutes:

SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his



official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (U.S.C., Title 28, Sec. 842.)